No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

ROLAND DEFAZIO,

Petitioner,

vs.

DONALD MARTINEZ, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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10 pp

QUESTIONS PRESENTED

1. May the United States Court of Appeals alter without explanation or prior notice its longstanding practice to forebear from exercising its statutory power to dismiss an appeal for reason that appellant has filed an untimely opening brief?

2. May the United States Court of Appeals employ a technically rigid standard under Rule 31(c) of the Federal Rules of Appellate Procedure to dismiss an appeal because of an untimely brief, without consideration of prejudice to appellees, the merits of the appeal, or the surrounding facts and circumstances?

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IN THE

SUPREME COURT

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October Term, 1993

ROLAND DEFAZIO,

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vs.

DONALD MARTINEZ, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Roland Defazio, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled proceeding on March 16,1993.

ORDERS BELOW

The order of the Court of Appeals for the Ninth Circuit, filed on March 16,

1993, and dismissing the appeal in the above-entitled action, has not been reported. Said order appears as Appendix A hereto.

The order of the Court of Appeals for the Ninth Circuit denying rehearing was filed on May 10, 1993, has not been reported. Said order appears as Appendix B hereto.

The order of the Court of Appeals for the Ninth Circuit rejecting Petitioner's suggestion for rehearing en banc of the court's order of May 10, 1993, was filed on June 8, 1993, has not been reported. Said order appears as Appendix C hereto.

JURISDICTION

The district court had jurisdiction of this action under 42 U.S.C. § 1983 and 28 U.S.C. §§1331 and 1343.

On March 16, 1993, the Court of Appeals denied Petitioner's request to

file his opening brief late. Concurrently, the Court of Appeals granted the motion, submitted by five of the Respondents, to dismiss the Petitioner's appeal for lack of prosecution. Petitioner's motion for rehearing (styled "Motion for Reconsideration") was denied by the Court of Appeals on May 10, 1993.

The jurisdiction of this Court to review the orders of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1983. Civil action for deprivation of rights.

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any

citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress. For the purposes of the section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

On the afternoon of October 22, 1990, Petitioner, then a 62 year old, retired television engineer, was visited at his Hawthorne, California, residence by Donald Martinez and Mark Sturgeon, plain clothes Redondo Beach, California, Police Department officers. The two officers, who are among the respondents herein, were in the process of investigating the involvement of Petitioner's automobile in a traffic accident which occurred approximately one month earlier. The officers contacted Petitioner and left.

About an hour later, Martinez knocked on Petitioner's door and shouted that Petitioner's Cadillac was being "arrested". Defazio exited and observed several Redondo Beach and Hawthorne Police Department officers in uniform together with Respondent Philip Thibodeau, a driver for Scotto Towing.

As Petitioner exited his apartment, Martinez struck him to the pavement causing permanent physical injury to Defazio's right arm. While on the ground uniformed officer Wayne Acosta struck him with a baton. Defazio was arrested and charged with assault on Thibodeau in violation of California Penal Code § 240 (assault) and with interference with rescue personnel in violation of Calif. Penal Code § 148.2. Petitioner was tried and acquitted on all counts.

Petitioner thereafter filed a timely complaint for damages under 42 U.S.C. § 1983 alleging Respondents conspired to cover-up the misconduct by falsely claiming Defazio assaulted the tow driver in his carport and was injured when the officers prevented the assault. The case went to a jury trial in District Court on March 31, 1992. The jury entered a defense verdict on April 3, and the court entered judgment on the

verdict on April 7, 1992.

Petitioner filed a timely notice of appeal with the Ninth Circuit on April 22, 1992. On May 12, 1992, the Clerk of the Court of Appeals issued a briefing schedule under Ninth Circuit Rule 31-2.1, which schedule required that Petitioner's opening brief be filed on August 10, 1992. Subsequently, because the court reporter needed additional time to submit the transcript, the court's briefing schedule was amended to require filing of the opening brief by November 24, 1992. The reporter's transcript was untimely delivered to Petitioner's counsel on October 22, 1992; accordingly, the court granted Petitioner's motion under Ninth Circuit Rule 31-2.3 for an extension of time until January 25, 1993, to file his opening brief.

Petitioner did not file his brief by January 25, 1993, nor did he seek another

extension of time. On February 18, 1993, City of Redondo Beach, the Respondents, filed a motion to dismiss the appeal for failure of Petitioner to file his opening brief.[1/] On March 1, 1993, Petitioner filed a timely opposition to Respondents' motion to dismiss and concurrently sought an order permitting him to file his opening brief two days later, on March 3, 1993. Petitioner's opposition papers represented that this delinquency was excusable by his counsel's engagement in two jury trials during the periods January 14, 1993 through January 29, 1993, and February 2, 1993 through February 19, 1993, respectively; that the Brief was nearing completion and it had been in progress since April 1992. Petitioner proceeded to lodge and serve

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[1/] Appellees Philip Thibodeau and Scotto Towing Company did not join in the motion and did not move to dismiss at any time.

to lodge and serve his opening brief on March 3, 1993.

On March 16, 1993, the court, without elaboration, granted Respondents' motion to dismiss the appeal and concurrently denied Petitioner's motion to file his opening brief. (Appendix A) Petitioner filed a motion for rehearing by the panel (styled "Motion for Reconsideration"), which motion was summarily denied by the court on May 10, 1993. (Appendix B)

REASONS FOR GRANTING THE WRIT

I.

The Court should properly exercise its powers of judicial supervision where a Court of Appeals, without statement or due notice to litigants, fundamentally and abruptly departs from established precedent governing litigation before it.

The Court of Appeals dismissed

Petitioner's appeal pursuant to Rule 31(c) of the Federal Rules of Appellate Procedure ("FRAP"), which permits an appellee to move for dismissal if an appellant fails to file the opening brief within the time allotted by the court. Petitioner concedes that, given a history of fair and reasonably consistent employment of Rule 31(c), a Court of Appeals has the inherent power to dismiss an appellant's case because of an untimely filed opening brief. Link v. Wabash Railroad Co., 370 U.S. 626, 630 (1962). Likewise, a Court of Appeals has the absolute right to exercise its discretion to permit a brief to be filed after the Rule 31(a) deadline, since Rule 31 is non-jurisdictional. Torres v. Oakland Scavenger Company, 487 U.S. 312 (1988); In re Beverly Mfg. Corp., 778 F.2d 666, 667 (11th Cir. 1985); Marcaida v. Rascoe, 569 F.2d 828, 830

(5th Cir. 1978).

Nevertheless, if Rule 31 is to achieve its purpose, certain fundamental requirements should be observed by the Courts of Appeals when exercising their "wide latitude of discretion". See, Western Pacific Railroad Corp. v. Western Pacific Railroad Co., 345 U.S. 247, 259-260 (1953). One such requirement is that the Court of Appeals neither exercise nor fail to exercise its discretion indiscriminately. Id. at 261. When such indiscrimination exercise of appellate discretion subverts the judicial process, then the responsibility lies with the Supreme Court to address the issue under its "general power to supervise the administration of justice in the federal court". Id. at 260.

Although a statute or rule may not compel the Court of Appeals to adopt any particular approach when exercising one of

its powers, "whatever the procedure which is adopted, it should be clearly explained, so that the members of the court and litigants in the court may become thoroughly familiar with it . . . " Id. at 267.

With respect to the matter of late opening briefs, the Ninth Circuit has had a history of liberal rulings preserving the rights of litigants where there has been a lack of prosecution by counsel. Accordingly, the Court of Appeals abused its discretion when, without prior notice or any explanation whatsoever, it abruptly employed the terminating sanctions of FRAP Rule 31 (c). This sea change in practice is in direct opposition to the Ninth Circuit's longstanding practice of choosing the less severe alternative of sanctions under FRAP Rule 46(c), which grants the Court of Appeals disciplinary power over

attorneys.

The Ninth Circuit's order dismissing Petitioner's appeal is all the more improper in light of

> "the important principal . . . that the requirements of the rules of procedure should be liberally construed and that "mere technicalities' should not stand in the way of consideration of a case on its merits."

Torres v. Oakland Scavenger Company, supra, 487 U.S. at 316; Foman v. Davis, 371 U.S. 178 (1962). Terminating sanctions were inappropriate in the case at bar, where Petitioner's counsel had not theretofore violated any rules or court orders. Certainly, the actions of Petitioner's counsel were not "substantially below what [was] reasonable under the circumstances".

Link v. Wabash Railroad Company, supra, 370 U.S. at 634, n. 10.

II.

The Ninth Circuit's dismissal of Petitioner's appeal was arbitrary, indiscriminate and in conflict with its own longstanding precedent for ruling flexibly with respect to dilatory pleadings.

The Ninth Circuit summarily granted Respondent's motion to dismiss Petitioner's appeal without discussion or comment. The court made no findings as to whether Respondents had been prejudiced by the Petitioner's submission of his opening brief thirty-eight (38) days late, nor did Respondents allege any such prejudice to their case. Further, the court made no finding regarding the reasonableness of Petitioner's explanation for the brief's tardy submission.

The Ninth Circuit's order terminating this litigation is in sharp contrast

to a string of its decisions, dating back to the early part of the century, in which the Court of Appeals indicated its reluctance to apply terminating sanctions in situations where there had been an alleged lack of diligent prosecution. Prior to the case at bar, the Ninth Circuit had shown due regard for the rights of litigants, and a pattern of deciding cases on their merits. Nevertheless, in dismissing Petitioner's appeal, the Ninth Circuit broke with its precedent without explanation or forewarning.[2/]

In Matsumura v. Higgins, 187 F. 601 (9th Cir. 1911), the court stated as follows:

[2/] Absent the convening of an en banc panel, the holding of a three judge panel is controlling authority in the Ninth Circuit. Le Vick v. Skaggs Companies, Inc., 701 F.2d 777 (9th Cir. 1983).

"Our rules are made to facilitate the prompt dispatch of business, with due regard to the rights of litigants, and compliance with their requirements will be enforced by the application of coercive power adequate for the purpose. This does not necessarily require that dismissal of a case without regard to the merits of the controversy shall be the penalty for an infraction of rules. On the other hand, the court will not grant indulgence to an appellant merely for his convenience, when not necessary to serve the ends of justice."

In McGrath v. Nolan, 83 F.2d 746

(9th Cir., 1936), appellant's brief was served on appellees only nineteen (19) days before oral argument, for reason that appellant's counsel "had been strenuously occupied in work and travel pending the appeal". Id., 83 F.2d at 751. The court denied appellee's motion to dismiss the appeal because the motion did not allege any prejudice because of delay.

> "In the absence of injury, we do not consider a minor violation of [the court's rules] sufficient ground upon which to deprive appellants of their day in court on the appeal."

Subsequently, in Rudick v. Prineville Memorial Hosp., 319 F.2d 764 768-69 (9th Cir. 1963), the court announced that it would not permit "the omission of counsel to prejudice the rights of litigants" and

declined to dismiss an appeal for various failures of the appellant's brief to confom to the court's rules. Then in Matter of Young, 537 F.2d 323 (9th Cir. 1976), the court scrutinized a situation in which appellant's attorney had failed to prosecute the appeal with due diligence. However, rather than dismissing the appeal, the court simply ordered the attorney to complete appellant's opening brief by a date certain under threat of subsequent sanctions if he failed to do so.

Finally, in Hamilton v. Neptune Orient Lines, Ltd., 811 F.2d 498, 500 (9th Cir. 1987), the Ninth Circuit considered the district court's dismissal of a plaintiff's lawsuit for want of prosecution. In reversing the dismissal, the appellate court held that the lower court had abused its discretion by failing to consider alternative sanctions and not complying

with its obligation to warn the plaintiff that dismissal was imminent.

> "While there is no requirement that every conceivable sanction be examined, meaningful alternatives must be explored."

Id. Accord, Von Poppenheim v. Portland Boxing & Wrestling Com'n, 442 F.2d 1047, 1049, 1053 (9th Cir. 1971) (dismissal for lack of prosecution should occur only "in extreme circumstances", and "less drastic alternatives should first be considered").

Further, until the Court of Appeals dismissed Petitioner's appeal, reported Ninth Circuit decisions dismissing appeals under FRAP Rule 31(c) were limited to situations of truly egregious behavior on the part of counsel. See, Fale v. Acheson, 241 F.2d 707, (9th Cir. 1957) (appeal dismissed where appellant's brief

never filed after three years).

The sudden "about face" demonstrated by the Ninth Circuit contrasts with the measured approach taken in other circuits which have determined to embark upon similarly strict practices under FRAP Rule 31(c). The Second Circuit now has a declared practice of refusing to consider late briefs "unless the movant avers something more than the normal (or even the reasonably anticipated but abnormal) vicissitudes inherent in the practice of law." United States v. Raimondi, 760 F.2d 460, 462 (2d Cir. 1985). Nevertheless, in Raimondi, the Second Circuit permitted the appellee to file its untimely brief.

> "It is possible that, in the past, we have not sufficiently articulated our concerns regarding extensions of time. Accordingly, I am inclined to

be somewhat lenient in disposing of the instant motion, while at the same time placing the bar on notice that such leniency ought not be expected in the future." Id. at 463.

Likewise, the Third Circuit gave the bar an explanation and due notice before changing its practices with respect to its requirements for appellate briefs. Compare United States v. Somers 552 F.2d 108, 115 (3d Cir. 1977), and Kushner v. Winterthur Swiss Ins. Co., 620 F.2d 404, 407 (3d Cir. 1980). In contrast, the Ninth Circuit gave no explanation whatever for the sea change in its practice of flexible acceptance of late pleadings. Such an unexplained change in practice, effected without any notice to the bar, undermines judicial process and should be corrected by the

Supreme Court's supervisory powers. Western Pacific Railroad Corp. v. Western Pacific Railroad Co., supra, 345 U.S. at 259-260.

III.

The Court should resolve a conflict among the circuits with respect to the standards for applying terminating sanctions under FRAP Rule 31(c).

It is beyond cavil that the Courts of Appeals have broad discretion to manage their own dockets; however, the variance in standards governing the exercise of this discretion should not be so broad as applies to Rule 31(c).

As discussed in § II, hereinabove, the Second, Third, and now, apparently, the Ninth Circuits operate under strict standards of technical rigidity with respect to dismissing appeals for reason that an

opening brief is filed beyond the deadline imposed under FRAP or the Court's briefing schedule. See, United States v. Raimondi, supra; Kushner v. Winterthur Swiss Ins. Co., supra. In direct contrast, the Fifth Circuit has consistently taken a flexible position with respect to late filings, and has emphasized the propriety of balancing considerations, including prejudice to appellee and the probability that appellant would prevail on the merits of the appeal. Marcaida v. Rascoe, surpa, 569 F.2d at 830; Phillips v. Employers Mutual Liability Ins. Co. of Wisc., 239 F.2d 79, 80 n.2 (5th Cir. 1956); Birmingham Fire Ins. Co. of Pa. v. Kight, 195 F.2d 178, 179 (5th Cir. 1952).

In deciding In re Beverly Mfg. Corp., 778 F.2d 666 (11th Cir. 1985), the Eleventh Circuit followed the lead of the Fifth Circuit in insisting that the appellate court consider prejudice to appellants and

state of mind of appellant's counsel be
dismissing an appeal for reason of an
untimely-filed opening brief.

> "Dismissal typically occurs in cases showing consistently dilatory conduct or the complete failure to take any steps other than the mere filing of a notice of appeal. . . . Strict enforcement is crucial to the policy underlying prompt notice of appeal . . . . Filing briefs, however, is not a jurisdictional pre-requsite, nor does it prejudice the parties and the court to a similar degree. See, Marcaida, supra. Thus, the more flexible standard requiring bad faith, negligence or indifference

is appropriate with regard to filing briefs."

Id. at 667.

The Sixth Circuit also has adopted a flexible standard for evaluating FRAP Rule 31(c) motions after consideration of appellant's previous conduct, alternative sanctions, and the merits of the appeal. Consolidation Coal Co. v. Gooding, 703 F.2d 231, 232-33 (6th Cir. 1983). While the Sixth Circuit knowledges the "inherent power" of appellate courts "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases" (citing Link v. Wabash Railroad Co., supra), that circuit also holds that "dismissal with prejudice is a harsh remedy not to be employed indiscriminately." Consolidation Coal Co. v. Gooding, supra, 703 F.2d at 232.

"...dismissal with prejudice

> is warranted only where 'a clear record of delay or contumacious conduct by the plaintiff' exists . . . and 'a lesser sanction would not better serve the interests of justice.'"

Id. at 233 (citing Gonzalez v. Firestone Tire and Rubber Co., 610 F.2d 241, 247 (5th Cir. 1980).

The foregoing demonstrates that a conflict exists among circuits of the Court of Appeals with respect to the appropriate standards for employment of sanctions under FRAP Rule 31(c). The conflict is an important one because the technically rigid standard employed in some circuits, including the Ninth, results in the denial of an appellant's day in court and undermines the judicial system. Accordingly, the Court should grant

Petitioner's petition for a writ of certiorari in order to resolve this inconsistency among circuits.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

THOMAS E. BECK
Counsel of Record
Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROLAND DEFAZIO, Plaintiff-Appellant, vs. DONALD MARTINEZ, individually and as an officer of the law, et al., Defendants-Appellees.	F I L E D MAR 16 1993 CATHY A. CATTERSON, Clerk U.S. COURT OF APPEALS No. 92-55544 DC# CV-91-5582-SVW Central California (Los Angeles)

ORDER

Before: WALLACE, Chief Judge, FARRIS and BRUNETTI, Circuit Judges

Appellant's motion to file the opening brief late is denied as untimely. See 9th Cir. R. 31-2.3(b). Appellees' motion to dismiss the appeal for lack of prosecution is granted. See 9th Cir. R. 42-2.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROLAND DEFAZIO, Plaintiff-Appellant, vs. DONALD MARTINEZ, individually and as an officer of the law, et al., Defendants-Appellees.	F I L E D MAY 10 1993 CATHY A CATTERSON, CLERK U.S. COURT OF APPEALS No. 92-55544 DC# CV-91-552-SVW Central California (Los Angeles)

ORDER

Before: WALLACE, Chief Judge, FARRIS and BRUNETTI, Circuit Judges

Appellant's motion for reconsideration of this court's March 16, 1993 order dismissing the appeal is denied.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROLAND DEFAZIO, Plaintiff-Appellant, vs. DONALD MARTINEZ, individually and as an officer of the law, et al., Defendants-Appellees.	F I L E D JUN 8 1993 CATHY A. CATTERSON, CLERK U.S. COURT OF APPEALS No. 92-55544 DC# CV-91-552-SVW Central California (Los Angeles)

ORDER

Before: WALLACE, Chief Judge, FARRIS and BRUNETTI, Circuit Judges

Appellant's suggestion for rehearing en banc of this court's May 10, 1993 order is rejected on behalf of the court.

No motions for reconsideration, rehearing, clarification, stay of mandate, or any other submissions shall be filed or entertained in this closed docket.